No. 99-1068

IN THE

Supreme Court of the United States

THE CITY OF NEW YORK, THE POLICE DEPARTMENT OF THE CITY OF NEW YORK; RUDOLPH GIULIANI, Mayor of the City of New York, and HOWARD SAFIR, Police Commissioner of the City of New York,

Petitioners,

—v.—

LATINO OFFICERS ASSOCIATION, INC., and ANTHONY MIRANDA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

NEW YORK CIVIL LIBERTIES UNION FOUNDATION, by

CHRISTOPHER DUNN
(*Counsel of Record*)
ARTHUR EISENBERG
NORMAN SIEGEL
125 Broad Street, 17th Floor
New York, New York 10004
(212) 344-3005

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COUNTERSTATEMENT OF THE CASE

In this case the petitioners -- the City of New York, the New York City Police Department (NYPD), Mayor Rudolph Giuliani, and Police Commissioner Howard Safir -- seek a writ of *certiorari* to review an order of the United States Court of Appeals for the Second Circuit. That order affirmed a preliminary injunction ordering the petitioners to permit the respondents -- the Latino Officers Association (a private organization of NYPD members) and its president -- to march in a series of public parades in New York City while wearing NYPD uniforms just as the Department allows twenty-five other organizations to march in uniform. In seeking this writ the petitioners present a materially inaccurate statement of the case, which affects both the jurisdiction of the Court and the merits of the case.

As an initial matter, it is not true that the Court of Appeals "broadly enjoined 'the parade policy,' without limiting the injunction to respondents or the particular parades they wished to join." Petition at 12. Rather, the Court of Appeals simply affirmed the judgment of the District Court, *see* Petitioners' Appendix ["Pet. App."] at A2, A24; and that judgment in turn directed the defendants to allow the respondent Latino Officers Association (LOA) to march in NYPD uniforms in five specific public parades, the last of which took place on October 10, 1999, *see* Pet. App. at A39. Moreover, it is not true that the District Court "did not in any manner address the parade policy" in the trial that took place in this matter in September 1999 and for which the parties are awaiting a final ruling. Petition at 5. To the contrary, the court heard substantial testimony about the parade policy, *see* Respondents' Appendix ["Resp. App."] at

RA1-12, and the respondents fully expect that the district court's final decision will include the respondents' specific request for a permanent injunction permitting them to march in future parades. Both of these facts, as is discussed below, bear directly on the Court's jurisdiction over this matter.

Turning to the merits of the dispute and recognizing that the underlying controversy concerns a specific decision applying the NYPD's parade policy to the LOA, the facts relevant to that decision become important, and the petitioners omit or misstate many of those facts. The Latino Officers Association was formed in early 1996 with a goal of addressing discrimination by the New York City Police Department affecting members of the NYPD and Latino communities in New York City. It is a private organization with 1500 members, most of whom are New York City Police Officers of Hispanic descent. *See* Pet. App. at A6. Since its inception LOA officials frequently have made public statements critical of NYPD policies and practices and have been actively involved in addressing issues of NYPD discrimination and misconduct. *See* Pet. App. at A35 & n.4.

The NYPD has a process by which it confers official NYPD recognition upon private organizations -- like the LOA -- that include members of the NYPD, and at the present time the NYPD has formally recognized twenty-five such organizations. *See* Pet. App. at A6.[1] The granting or

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[1]For example the NYPD has recognized -- and thus permits to march in NYPD uniforms behind their organizational banners -- groups such as the Emerald Society, the Holy Name Society (Manhattan-Bronx-Staten

(continued...)

denial of NYPD recognition has a broad impact on the associational and expressive activities of organizations of NYPD members, including the right to recruit potential new members at the Police Academy, the right to use NYPD facilities for organizational events, and the right to march in public parades in NYPD uniforms behind an organizational banner. *See id.* at A6-7. Pursuant to this policy, recognized organizations routinely march in NYPD uniforms in public parades. *See* Resp. App. at RA16 (Stipulation 12).

Wishing to avail itself of the benefits of recognition, the LOA on several occasions has sought formal NYPD recognition, but on each occasion the Department has denied the LOA's request. *See* Pet. App. at A28. After the first such denial, the LOA filed suit against the Department (in February 1997).

In May 1998, three months after the district court denied the petitioners' motion to dismiss the respondents' original complaint, the NYPD issued a memorandum that addressed NYPD recognition of religious, fraternal, and ethnic organizations. Resp. App. at RA15 (Stipulation 6) That memorandum provides that "OFFICIAL RECOGNITION OF AN ORGANIZATION IS AT THE SOLE DISCRETION OF THE POLICE COMMISSIONER." Pet. App. at A41 (capitalization in original).

With this policy in effect, Police Commissioner

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[1](...continued)
Island), the Holy Name Society (Brooklyn-Queens), Police Officers for Christ, the Saint George Association, and the Saint Paul's Society. *See* Pet. App. at A27 n.2.

Howard Safir denied the LOA's most recent request for recognition on May 5, 1999. It is stipulated that "[i]t is the defendants' position that Commissioner Safir denied the May 1998 request from the Latino Officers Association for NYPD recognition solely and exclusively because Commissioner Safir concluded that the activities of LOA were duplicative of the Hispanic Society's activities." Resp. App. at RA17 (Stipulation 20). (The Hispanic Society is an organization recognized by the NYPD that has approximately 250 members and that has politically supported Mayor Rudolph Giuliani. *See* Pet. App. at A6, A8.) The respondents contend, however, that the NYPD's denial of recognition in fact is in retaliation for the public criticisms leveled against the Police Department by the LOA, *see id.* at A8, A28-29, and further that, even if the NYPD acted for the reason it claims, that reason is insufficient to justify the NYPD's infringement upon the LOA's associational and expressive rights under the First Amendment, *see* Resp. App. at RA21 (Second Amended Complaint, ¶ 3). The LOA therefore has sought permanent injunctive relief that would entitle it to recognition and the benefits of recognition. *See id.* at RA20-32 (Second Amended Complaint).

The Second Circuit decision at issue here arises out of one aspect of the LOA's suit, namely the petitioners' refusal to permit the LOA to march in public parades in NYPD uniforms. The NYPD refused to allow the LOA to march in certain public parades in 1999 "because the LOA is not formally recognized by the NYPD," Resp. App. at RA16 (Stipulations 13-14), and the LOA in response sought a preliminary injunction that would permit it to march in five specific parades scheduled to take place between June and

October 1999. The District Court concluded that the LOA was likely to prevail on its claim challenging the petitioners' decision and issued its preliminary injunction on June 8, 1999. *See* Pet. App. at A25-39. After expediting the petitioners' appeal, the Court of Appeals affirmed the District Court's judgment on October 6, 1999, *see* Pet. App. at A2; and issued a decision explaining that order on November 16, 1999, *see id.* at A3-24.

While the Second Circuit proceedings were taking place, the parties completed discovery, and the respondents -- with the consent of the petitioners – filed an amended complaint, which expressly addressed the issue of marching in NYPD uniforms. *See* Resp. Pet. at RA20-32. In September 1999 the District Court proceeded with a bench trial on the merits of all of the plaintiffs' claims and heard substantial testimony about the issue of the LOA marching in NYPD uniforms, *see* Resp. App. at RA1-12, but at the conclusion of the trial indicated that it intended to await the Second Circuit's ruling on the preliminary injunction before adjudicating the respondents' claims for permanent injunctive relief. After the Second Circuit issued its opinion in November, the parties proceeded with post-trial briefing that is to be completed by the end of January 2000, after which the District Court will render a final decision.

REASONS FOR DENYING THE WRIT

The preliminary injunction that the Second Circuit affirmed has expired by its own terms, and thus no case or controversy exists for this Court to adjudicate at this time. Independent of that, the petitioners have failed to identify any compelling reason for granting a writ of *certiorari* in this matter, as their arguments amount to little more than assertions that the Second Circuit misapplied prior decisions of this Court. And those assertions are without merit.

I. NO CASE OR CONTROVERSY EXISTS FOR THIS COURT TO ADJUDICATE AT THIS TIME.

This proceeding arises out of a motion the respondents filed in June 1999 in which they sought a preliminary injunction that would allow them to march in NYPD uniforms in five specific parades, the last of which was to take place on October 10, 1999. *See* Resp. App. at RA33-34 (Plaintiffs' Amended Motion for a Preliminary Injunction). The District Court granted that motion and entered an order that dealt specifically and exclusively with those five parades, *see* Pet. App. at A39, and the Court of Appeals simply affirmed that order: "IT IS HEREBY ORDERED that the judgment of the District Court is unanimously affirmed," Pet. App. at A2. Because the last parade covered by the Court of Appeals order took place on October 10, 1999, that order no longer involves the constitutionally requisite case or controversy, and thus nothing remains for this Court to adjudicate at this time.

The petitioners twice assert that the Court of Appeals order goes beyond the specific 1999 parades and broadly

enjoins enforcement of the NYPD's parade policy, *see* Petition at 8, 12, but this simply is not true. The only support the petitioners provide for these assertions is a citation to page A24 of their appendix, *see* Petition at 12, which is the last page of the Second Circuit's opinion and which concludes as follows: "Accordingly, the judgment of the District Court is affirmed." Nothing in that sentence or in any other sentence on that page (or anywhere else in this case) modifies the Second Circuit's order, which unambiguously addressed only the five 1999 parades. No ongoing case or controversy exists with respect to the preliminary injunction the District Court issued and the Second Circuit affirmed.

The petitioners next argue that they may never have the opportunity to present the issues they claim exist in this case if the Court does not grant their writ, and in support of this position they represent to the Court that "the complaint does not address the parade policy" and that "[t]he trial that has been held on respondents' challenge to the recognition policy . . . did not in any manner address the parade policy." Petition at 12-13. These factual assertions are false, and the petitioners will have ample opportunity to seek this Court's review in the future.

The amended complaint that the respondents filed in August 1999 includes express allegations about the NYPD's refusal to permit the LOA to march in NYPD uniforms in public parades, *see* Resp. App. at RA20-32 (Amended Complaint, ¶¶ 2, 15, 17, 40, 44), and the District Court heard substantial testimony about this issue, *see* Resp. App. at RA1-9 (Testimony of Anthony Miranda); *id* at RA10-12 (Testimony of Edgar Rodriguez). Consistent with this, the

respondents addressed the issue in their post-trial submissions to the District Court, *see* Resp. App. at RA35-40 (Proposed Findings of Fact), and they fully expect the court to rule on this matter when it adjudicates the respondents' request for a permanent injunction.

Given all this, the respondents see no basis for the petitioners' contention that this issue "may utterly evade this Court's review if not addressed at this time." Petition at 12 (heading). Should the District Court issue a permanent injunction, the respondents can appeal to the Second Circuit, which then will issue an order about which the petitioners could seek the writ they now request. Indeed, as the petitioners acknowledge, *see* Petition at 12, it is the standard practice of this Court not to review interlocutory orders and instead to await final judgments. Nothing in this case warrants deviating from that approach.

II. THE PETITIONERS HAVE IDENTIFIED NO COMPELLING REASON FOR THE COURT TO GRANT A WRIT OF *CERTIORARI* IN THIS MATTER.

A writ of *certiorari* is an extraordinary writ that this Court grants only for compelling reasons, which might include the existence of a significant conflict between or among the Courts of Appeals or a lower court opinion that presents an issue of major legal or factual importance. *See* Rule 10 of the Rules of the Supreme Court. In this case, even if a case or controversy existed, the petitioners have failed to identify a compelling reason for the Court to grant a writ of *certiorari*, and no such reason exists.

The petitioners do not suggest that this case presents any issue about which a significant conflict exists among the Courts of Appeals, nor do they suggest that the Second Circuit's decision decides an important question of federal law in a way that conflicts with a decision by a state court of last resort. *See* Petition at 9-12. Respondents likewise believe that neither consideration applies to this case.

The petitioners do suggest that this case presents an issue of considerable national import, asserting that "[t]he issues the petition presents have nationwide importance to the many local police departments with policies governing the use of their uniforms and insignia." Petition at 9. *Accord id.* at 11 ("This Court should hear this case because the federal injunction against petitioners' parade policy constitutes an unwarranted federal judicial interference in petitioners' control of the display of its police uniform -- its primary symbol of authority . . . ."). While these broad statements suggest important issues, they have no bearing on the issues in this case.

This case presents no question about the general authority of police departments to regulate the use of their uniforms. That authority unquestionably is broad, and neither the lower courts nor the respondents questioned that authority. Rather, this case concerns the circumstances under which a police department that freely permits organizations to march in public parades in its uniform can then deny that privilege to one particular organization. The Second Circuit concluded that in the specific facts of this case the NYPD had failed to identify a sufficient justification for its refusal to permit the LOA to march in public parades while permitting twenty-five other organizations to engage in

the exact same conduct, and it is that conclusion that would be before this Court were it to grant the writ sought by the petitioners. The respondents respectfully submit that that issue is not of sufficient significance to warrant review by this Court.

The real thrust of the petitioners' arguments is that the Second Circuit misapplied various decisions of this Court. *See* Petition at 10 (asserting that Second Circuit's decision "misapplies" *United States v. National Treasury Employees Union* and "conflicts" with *Rust v. Sullivan* and *Goldman v. Weinberger*). Even if that were true -- and the respondents assert that it is not -- the mere misapplication of decisions of this Court would not normally provide a basis for granting a writ of *certiorari* absent a showing of some broader significance of the case, and the petitioners have made no such showing.

III. THE PETITIONERS' CONTENTION THAT THE SECOND CIRCUIT ERRED IS WITHOUT MERIT.

Turning to the merits, the petitioners contend that the Court of Appeals used the wrong doctrinal standards and further suggest that had it applied the correct standards it would not have affirmed the District Court's judgment because, the petitioners assert, the NYPD has a strong interest in regulating the use of its uniforms and because the preliminary injunction will substantially harm that interest. However, this case does not implicate any general interest police departments have in regulating the use of their uniforms, and the lower courts found as a matter of fact that the petitioners had failed to adduce any evidence of harm

that might result from permitting the Latino Officers Association to march in NYPD uniforms. In light of this, the petitioners' argument about the applicable legal standard, which is incorrect, simply is irrelevant, as the petitioners did not even meet the burden they themselves propose.

A. This Case Presents No Dispute About the Importance of Police Department Regulation of the Use of Police Uniforms.

The basic premise of the petition is that this case implicates a fundamental right of police departments to regulate the use of their uniforms. This approach misapprehends the nature of the dispute between the parties and the decisions of the lower courts.

The NYPD -- like all other police departments -- has a strong and legitimate interest in regulating the use of its uniforms, and the respondents have never suggested otherwise. More importantly, the Second Circuit expressly recognized this interest:

> It is undisputedly true that the NYPD has a strong interest in maintaining control over how its uniform and symbols are used. Requiring NYPD officers to wear their uniforms while on duty makes them "more readily recognizable to the public, encourages *esprit de corps*, and subordinates personal preferences in favor of the overall group mission," all of which furthers the police department's mandate to promote public safety. Correspondingly, prohibiting the

> unauthorized wearing of a police uniform prevents improper exercise of the powers granted to police officers and exploitation of the trust that wearing a police uniform is meant to inspire.

Pet. App. at A20-21 (citations omitted). This case, however, does not present any challenge to a general regulation or prohibition concerning the use of NYPD uniforms. Rather, it concerns the NYPD's specific decision to prohibit the LOA from marching in uniform when it permits twenty-five other private organizations of police officers to use the Department uniform in identical circumstances. As the Second Circuit explained,

> [D]efendants' interest in controlling the use of the NYPD uniform does not support the specific restriction at issue here -- namely, the prohibition on plaintiffs' marching in uniform behind their organizational banner in an ethnic pride parade when similarly situated organizations are allowed to march in such a manner. Whether or not defendants could constitutionally prohibit all fraternal organizations from marching in uniform -- an issue we need not, and do not, decide -- the fact of the matter is that the NYPD already permits at least 25 such organizations to march in uniform. Having allowed these organizations to use the NYPD uniform in such a manner over many decades, the NYPD cannot now deny plaintiffs the same privilege without demonstrating that their use of the

> uniform is both distinguishable from that of the various authorized organizations and "so threatening to the efficiency of the [NYPD] as to render the [restriction] a reasonable response to the threat."

Id. at A21 (citation omitted).

This case presents only the narrow question whether one specific police department has justified its specific decision denying one specific group the right to use uniforms in public parades when the same police department permits twenty-five other organizations to march in uniform. Whatever might be the significance of a lower-court ruling barring police departments from regulating the use of their uniforms, this case involves no such ruling.

B. The Petitioners' Contentions About Harm Have No Support in the Record and Are Irrelevant to the Issues in this Case.

Not only are the petitioners incorrect in suggesting that this case presents broad issues about control over the use of police uniforms, they are incorrect in suggesting that any basis exists for concluding that the Second Circuit's decision will harm any legitimate interest of theirs. The petitioners specifically suggest that they will be harmed because, they allege, the public will attribute to the NYPD the message conveyed by police groups that march in public parades in NYPD uniforms. *See* Petition at 18 (stating that "the very linchpin" of the Department's position is that "a group of officers marching in a parade in uniform necessarily speaks for the Department"). This suggestion encounters a host of

problems.

First, on a procedural point, the petitioners never offered this argument to the District Court. Instead, they argued only that concerns about harmony and the expenditure of Department resources justified their position, and the District Court found as a matter of fact that the petitioners had adduced no evidence to support either proposition. *See* Pet. App. at A37-39.

On a second and related point, nothing in the record suggests -- much less establishes -- that the NYPD has been or will be harmed by public perceptions about police groups marching in uniform. Indeed, the tenuousness of the petitioners' position about this purported harm is evident from their own extraordinary suggestion that this Court in effect take judicial notice of this critical factual point: "In this case, it can properly be presumed that the government is harmed by the banning of its parade policy . . . ." Petition at 15 (emphasis added). Setting aside the fact that the lower courts did not enjoin the NYPD's parade policy, the petitioners offer no reason to why this Court should presume such harm, and no such reason is apparent to the respondents.

Finally, even if one assumed that the public might ascribe some aspects of the message conveyed by groups marching in NYPD uniforms to the NYPD, that could not in any way explain the petitioners' position here, which deals specifically with the one particular group -- the Latino Officers Association. If a concern about public perception of NYPD endorsement of an organizational message actually motivated the NYPD in this case, one would expect the Department to have adduced evidence demonstrating that

something about the specific message of the LOA was of concern to the Department and distinguished the LOA from the other groups the NYPD allows to march in uniform. The petitioners, however, have never suggested at any point in this litigation that any aspect of the message conveyed by the LOA provided the basis for denying it the right to march in uniforms. To the contrary, the petitioners have stipulated that they refused to permit the LOA to march because it was not recognized, *see* Resp. Pet. at RA16 (Stipulations 13-14), and further that they had not recognized the LOA "solely and exclusively because Commissioner Safir concluded that the activities of LOA were duplicative of the Hispanic Society's activities," *id.* at RA17 (Stipulation 20). As the Second Circuit explained, these stipulations foreclose any contention by the petitioners that they would be harmed by allowing the LOA to march:

> In short, the defendants have failed to satisfy their burden of showing that plaintiffs' expression specifically would have an impact on the actual operation of government. In fact, by their own conduct, defendants have proved the exact opposite, for, throughout most of this dispute, defendants have justified their prohibition of the LOA marching in uniform on the sole ground that its message is duplicative of the Hispanic Society's message. The NYPD, having allowed the Hispanic Society to march in uniform and behind its banner, cannot now contend that allowing the LOA to do the same would have a detrimental effect on its actual operations.

Pet. App. at A24. Not only is the record devoid of any support for the petitioners' contention that the lower court orders permitting the LOA to march in public parades in NYPD uniforms would harm or had harmed the petitioners, it establishes the contrary.

C. The Second Circuit Did Not Err in Applying the Doctrinal Standards It Applied in this Case.

Framing the petitioners' assertions about their interests and the harm to those interests is their contention that the Second Circuit erred in applying the doctrinal standards of *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) ("*NTEU*"), to the controversy in this case. *See* Petition at 14-15. As an alternative, the defendants contend that the less-demanding standard developed by the Court in *Pickering v. Board of Education*, 391 U.S. 563 (1968), should control this case. *See* Petition at 18. The lower courts, however, correctly apply *NTEU*. Moreover, even if *Pickering* controlled this case the outcome would be the same, as under the doctrine of that case the government still bears the burden of justifying its position and the lower courts found as a matter of fact that the petitioners had failed to adduce any evidence to support their restriction on the expressive activity of the LOA.

It is stipulated that the petitioners have an across-the-board policy that prohibits groups that the NYPD has not recognized from marching in public parades in NYPD uniforms behind their organizational banners, *see* Resp. App. at RA16 (Stipulation 11), and it is stipulated that it was on the basis of this policy that the NYPD prohibited the LOA from marching in NYPD uniforms behind its organizational

banner, *see id.* (Stipulations 13-14). Additionally, the District Court found as a matter of fact -- and the Court of Appeals agreed -- that the petitioners' refusal to permit the LOA to march in NYPD uniforms burdened significant expressive activity of the respondents. *See* Pet. App. at A34-36 (District Court decision); *id.* at A16-19 (Court of Appeals decision). Given these facts, the Court of Appeals correctly concluded that *NTEU* controls this case.

At issue in *NTEU* was a federal ban on the receipt of honoraria by federal employees for their speeches or writings. Like the policy at issue here, the federal ban did not prohibit speech; instead it burdened it. And as do the defendants here, the federal government in *NTEU* argued that the Court should employ the balancing test prescribed by *Pickering* in assessing the constitutionality of the honorarium policy. The Court considered the argument at length, *see* 513 U.S. at 464-70 (part III), and its rejection of that argument forecloses the petitioners' argument here.

In *NTEU* the Court started its analysis with the observation that under *Pickering* and other cases the Court had recognized that the government "may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large." 513 U.S. at 465. It then emphasized, however, that the *Pickering* test applies to decisions made about speech by an individual employee after the speech has taken place. The Court expressly contrasted that situation to the one presented by a policy that burdens speech before the speech has taken place:

> Unlike *Pickering* and its progeny, this case does not involve a *post hoc* analysis of one

> employee's speech and its impact on that employee's public responsibilities. *Cf. Waters v. Churchill*; *Rankin v. McPherson*; *Connick v. Meyers*; *Perry v. Sinderman.* Rather, the Government asks us to apply *Pickering* to Congress' wholesale deterrent to a broad category of expression by a massive number of potential speakers. . . .
>
> . . . . The widespread impact of the honoraria ban, however, gives rise to far more serious concerns than could any single supervisory decision. In addition, unlike an adverse action taken in response to actual speech, the ban chills potential speech before it happens. For these reasons, the Government's burden is greater with respect to this statutory restriction on expression than with respect to an isolated disciplinary action.

513 U.S. at 466-68 (citations and footnote omitted).

The Court therefore expressly rejected in *NTEU* the contention that *Pickering* applies to challenges to government regulations or policies that burden speech by groups of employees before the speech has taken place. Since the petitioners here enforced against the LOA a policy that burdened expressive activity before it took place, their action likewise is subject to the doctrinal standards articulated in *NTEU*.

In the Court of Appeals the petitioners made three specific arguments in support of their contention that *NTEU* did not apply to this case, but the Court of Appeals

rejected each of those arguments, *see* Pet. App. at A12-16, and the petitioners now appear to have abandoned them. Instead, the petitioners contend, somewhat elliptically, that the policy at issue in *NTEU* and the one at issue here are very different and therefore that "[m]ore specific analysis is required to address the issue of the appropriate measure of legality . . . where two such different types of rules are at issue." Petition at 15. The petitioners fail, however, to identify any such analysis, *see id.* at 15-18, and nothing in the petition explains what about the policy at issue here justifies an exception to the *NTEU* standards. The respondents respectfully submit that this controversy falls squarely within *NTEU* for the reasons offered by the Court of Appeals.

Finally, even if one assumed simply for the purposes of argument that the *Pickering* standard did apply, the petitioners still would bear the burden of justifying their actions in this case by demonstrating that the expressive activity of the LOA in fact had harmed the NYPD or reasonably could be expected to harm the Department. *See, e.g., Rankin v. McPherson*, 483 U.S. 378, 388 (1987) ("The State bears the burden of justifying the discharge on legitimate grounds."). Here, as discussed above, the lower courts found as a matter of fact that the petitioners had adduced no evidence of any harm that had resulted or would result from allowing the LOA to march in NYPD uniforms in pubic parades. Thus, even if one accepted the petitioners' proposed legal standard, the Second Circuit did not err in affirming the preliminary injunction entered by the District Court.

IV. THE PRELIMINARY INJUNCTION AFFIRMED BY THE SECOND CIRCUIT WAS LEGALLY AND FACTUALLY APPROPRIATE.

The appeal presented to the Court of Appeals in this matter was to the entry of a preliminary injunction, and the Second Circuit did nothing more than conclude, given the factual findings of the District Court, that the lower court had not abused its discretion in concluding that the respondents were likely to prevail on the merits of their claim. *See* Pet. App. at A9-10, A24. This conclusion was entirely appropriate.

As discussed above, the Court of Appeals -- as had the District Court - recognized that the NYPD's refusal to permit the LOA to march in public parades in NYPD uniforms implicated significant expressive interests protected by the First Amendment. This position is amply supported, given this Court's holding in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston* that participation in public parades is inherently expressive activity that lies at the core of the First Amendment, *see* 515 U.S. 557, 568-69 (1995), and the District Court's findings of fact that the petitioners' actions in fact burdened the LOA's expressive participation in the parades at issue, *see* Pet. App. at A34-36 (District Court opinion); *id.* at A17-19 (Court of Appeals opinion). The Court of Appeals then applied the *NTEU* standards and concluded that, because the petitioners had adduced no evidence of any harm that might justify their position, they had failed to meet their burden under *NTEU*. *See* Pet. App. at A19-24. The respondents respectfully submit that this reasoning and conclusion are well-founded and provide no basis for review by this Court.

Beyond the *NTEU* analysis, an independent basis existed for the entry of the preliminary injunction in this matter. In both the District Court and the Court of Appeals the respondents noted that the NYPD's recognition policy constituted a licensing scheme by which private groups could obtain permission to use NYPD uniforms for expressive activity in public parades. Consequently the respondents argued, the recognition policy, to the extent it licenses expressive activity, had to contain the standards mandated by this Court in *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), and its progeny. *See* Pet. App. at A24 n.12 (noting but not addressing respondents' argument).

This Court has held that licensing schemes, to qualify as reasonable time, place, and manner restrictions on expressive activity, must contain "'narrow, objective, and definite standards to guide the licensing authority'" so as to assure that the authority does not have undue discretion in controlling First Amendment activity. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (quoting *Shuttlesworth*, 394 U.S. at 150-51). As the Court recognized thirty years ago in *Shuttlesworth*, licensing schemes that confer undue discretion on government officials are unconstitutional:

> It is settled by a long line of recent decisions of this Court that an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official -- as by requiring a permit or license which may be granted or withheld in the discretion of such official -- is an unconstitutional censorship or

> prior restraint upon enjoyment of those freedoms.

394 U.S. at 151 (internal quotations and citation omitted).

Here, the NYPD's recognition policy contains no standards of any sort, much less the requisite "narrow, objective, and definite standards" mandated by the Court. To the contrary, the decision to grant or to deny recognition rests in the "sole discretion" of the Police Commissioner. *See* Pet. App. at A41 (para. 1); Resp. App. at RA18 (Stipulation 22).[2] This is the essence of unconstitutional discretion and plainly violates the requirements of *Shuttlesworth* and its progeny. *See, e.g., Forsyth*, 505 U.S. at 129-33 (part IIA) (invalidating on its face a county ordinance that left administrator with discretion to vary permit application fees); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 769-72 (1988) (part III) (invalidating on its face a Cleveland ordinance that authorized Mayor to deny a request to place newsracks on city streets because "ordinance itself contains no explicit limits on the Mayor's discretion"); *Shuttlesworth*, 394 U.S. at 149-51 (invalidating on its face ordinance that allowed government officials to refuse a permit if "the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused"). This provides an

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[2]Though the recognition policy appears to contain guidelines controlling the recognition process, it is stipulated that the Police Commissioner is not bound by those guidelines and that recognition decisions are at his sole discretion. *See* RA18 (Stipulation 22).

independent basis for the preliminary injunction in this case.[3]

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[3]The concern about unfettered discretion is not an abstraction in this case. The LOA has been openly critical of certain NYPD policies and practices and specifically has alleged that the NYPD denied it recognition in retaliation for its critical public statements. *See* Resp. App. at RA21 (Second Amended Complaint, ¶ 3). This is the very type of concern that *Shuttlesworth* was intended to address. *See Forsyth*, 505 U.S. at 130 ("A government regulation that allows arbitrary application is inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view."; internal quotations and citation omitted).

CONCLUSION

For all the foregoing reasons, the Court should deny the petitioners' request for a writ of *certiorari*.

Respectfully submitted,

NEW YORK CIVIL LIBERTIES
UNION FOUNDATION, by

CHRISTOPHER DUNN
(*Counsel of Record*)
ARTHUR EISENBERG
NORMAN SIEGEL
125 Broad Street, 17th Floor
New York, N.Y. 10004
(212) 344-3005

Attorneys for the Respondents

Dated: January 21, 2000
New York, N.Y.

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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LATINO OFFICERS ASSOCIATION, INC, and ANTHONY MIRANDA,

Plaintiffs,

-against-

CITY OF NEW YORK, THE POLICE DEPARTMENT OF THE CITY OF NEW YORK; RUDOLPH GIULIANI, Mayor of the City of New York, and HOWARD SAFIR, Police Commissioner of the City of New York,

Defendants.

----------x

September 23, 1999
10:05 a.m.

Before:

HON. LEONARD B. SAND,
District Judge

APPEARANCES

NEW YORK CIVIL LIBERTIES UNION FOUNDATION
Attorneys for Plaintiffs
CHRISTOPHER DUNN
ARTHUR EISENBERG

MICHAEL HESS
Corporation Counsel of the
City of New York
Attorney for Defendants
BRYAN D. GLASS
AMY REGAN

. . . .

Q. Mr. Miranda, it has been stipulated that only recognized organizations are permitted to march in public parades in NYPD uniform. Are you familiar with that policy?

A. Yes.

Q. Mr. Miranda, does the Latino Officers Association want to be able to march in public parades in NYPD uniforms behind its organizational banner?

A. Yes, we do.

Q. And why do you want to do that?

A. It is a form of communication, an ability to communicate with the Hispanic community. It is a way of showing that there are Hispanic officers in the New York City Police Department well represented.

It is a way of also showing that our organization -- and we have taken some views against police brutality and various Police Department policies -- that we are still a part of the New York City Police Department. The uniform holds a special significance in the Hispanic community of respect and sort of accomplishment. So we definitely would like to march in parades in uniform behind our banner.

Q. Now, you mentioned specifically the notion about conveying to the public some information about how a group

that is concerned about discrimination is part of the New York City Police Department.

First tell me, what sort of parades do you want to participate in?

A. We want to march in the cultural Hispanic parades. There has been one other parade called the Unity Day Parade which is also a cultural parade.

Q. To your knowledge, are those parades that are attended by members of the Latino community here in New York City?

A. They are heavily attended by the Hispanic community.

THE COURT: The parades that were held since Judge Wood entered her order, did the LOA in fact participate in those parades?

THE WITNESS: Yes, we did. One parade was cancelled.

THE COURT: Bear with me a moment.

(Pause)

THE COURT: The Manhattan Puerto Rican Day Parade June 13, 1999, did that take place?

THE WITNESS: Yes.

THE COURT: And LOA participated?

THE WITNESS: Yes.

THE COURT: The Dominican Day Parade in August '99, did that take place?

THE WITNESS: I think the Dominican Day Parade and the Brooklyn Day Parade were reversed on the dates.

THE COURT: The dates were reversed?

THE WITNESS: Yes.

THE COURT: But did the LOA participate in both

those parades?

THE WITNESS: The Brooklyn Day Parade was cancelled and rescheduled and the Dominican Day Parade we participated in.

THE COURT: And on September 12, was there a parade -- I'm embarrassed, I don't know how to pronounce it, D-E-S-F-I-L-E?

THE WITNESS: Desfile de Hispanidia Day Parade in Queens. It is basically the Queens Hispanic Day parade.

THE COURT: Did the LOA participate in that?

THE WITNESS: Yes, we did.

THE COURT: And you participated in the parade on October 10?

THE WITNESS: Yes, sir.

BY MR. DUNN:

Q. Mr. Miranda, with respect to the presence of members of the Latino community in these parades, is that a specific community that you were concerned about conveying your message about discrimination of police misconduct to?

A. Yes, it is.

Q. How does wearing the uniform play a role in conveying that message?

A. Well, the parades also, while we are marching at the end of the parades, we have had many community organizations and people from the crowd give us their information so we can contact them at future dates.

The uniform has a significance in the Hispanic community, again, because it is a level of respect. It shows that we are viable, we are a part of the New York City Police Department, and although we are voicing difference views

on the policies and critical of what they do, that we are still upholding citizens and members of the New York City Police Department.

Q. Does the banner you carry identify you as being part of the New York City Police Department?

A. I'm sorry?

Q. Does the banner that you have at these events identify you as being part of the New York City Police Department?

A. No, it does not.

Q. What does your banner say?

A. The banner says Latino Officers Association -- City of New York, and it shows the emblem of the statue of justice and an outline of the five boroughs.

MR. DUNN: Your Honor, just for your information, NYPD Personnel Memo 30 has a specific prohibition against non-recognized organizations using the name, emblems or logos of the Police Department.

Q. Mr. Miranda, if you couldn't wear the uniform in the parade, would people watching you know that you were part of the New York City Police Department?

A. No.

Q. Mr. Miranda, are there police officers who are at these parades who are working?

A. Yes, there are.

Q. Does your ability to participate in these parades in uniform have any relevance as to what you would like to convey to the police officers who are working at these events?

A. Certainly. It also sends a message within the agency that we are here, that we are a strong organization. We have had many Hispanic officers who are working those details

who, you know, applaud us and egg us on saying great job, glad to see you here, that this organization is out there representing them.

Q. Are any of these events, these parades that you mentioned, large parades?

A. Yes.

Q. What is the largest of the parades?

A. The largest of the parades is the Manhattan, the Puerto Rican Day Parade. Its is called the National Puerto Rican Day Parade.

Q. Do you have any idea of the size of that event?

A. I think it is well over 50,000 people. I don't know the exact numbers, but I know it is the largest parade in New York. I believe it is one of the largest.

Q. And this is a significant event within the Latino community?

A. Yes, that particular parade is the largest event held in the Hispanic community.

Q. What is the significance of being to participate in parades other than the Puerto Rican Day Parade in Manhattan, other parades that take place in other boroughs outside of Manhattan?

A. The significance –

MS. REGAN: Objection. I think we have been through this.

THE COURT: Excuse me?

MS. REGAN: I think that this is repetitive questioning.

THE COURT: Overruled.

A. The significance of marching in the various boroughs is that you have -- you are actually addressing those specific

communities. They have a large turnout of members such as in Queens, the people who reside in Queens, there are more people there. The same thing in the Bronx and the Brooklyn parades. You tend to address and see more of those community residents as opposed to everyone going into Manhattan. While Manhattan is the largest parade, it is still not attended by every Hispanic in New York City. So going to the other boroughs allows us access to the various communities there.

Q. Do you have members who live in boroughs outside of Manhattan?

A. Yes, we do.

Q. And does your ability to participate in parades outside of Manhattan have any particular significance for those members?

A. Yes. We have the participation of usually the members who work in those precincts or reside in that community come out and march in the smaller parades.

Q. So does that mean that a parade in Brooklyn is a parade in which LOA members who are in Brooklyn may be more likely to participate in?

A. Yes.

Q. With respect to the parades that you've participated in -- Judge Sand was asking you about this earlier -- have there been any problems associated, to your knowledge, with your having marched in these parades?

A. Yes.

Q. What problems have there been?

A. There have been no problems in terms of our members involved with the Police Department or any other time. We have not had any problems.

But we have had the monitoring of our internal affairs, the interruption of our parade, the walking up and down of our ranks by members of the New York City Police Department, and just basic disruption by the New York City Police Department more often.

Q. Is this something that's happened with respect to the parades that have taken place in 1999?

A. No, it had not.

Q. With respect to the parades that have taken place this year, the three parades in which you have participated, were there any problems that resulted from your participation in the parade?

A. No. Again, in none of the parades have we had any incidents with any member of our association and with discipline or otherwise. We have marched without incident.

THE COURT: When you are assigned a marching order, did the Hispanic Society also participate in those parades?

THE WITNESS: Yes.

THE COURT: Were you –

THE WITNESS: Some of the parades, yes.

THE COURT: Would you be behind or in front of each other?

THE WITNESS: We recently were lined up in front of the Hispanic Society. And as of some negotiation with the police brass there, they placed the Hispanic Society in front of us against what the organizers of the parade had allowed. But we participated, anyway, in that parade.

I believe in each of the parades where we've participated with them, we've had the largest representation of New York City police officers.

THE COURT: There was no interaction between the Hispanic Society members and the LOA members marching in the parade?

THE WITNESS: No.

BY MR. DUNN:

Q. Mr. Miranda, when a group of NYPD members marches in a public parade, such as the parade we've been discussing, does the Police Department send the band or anything else that is associated with the Police Department?

A. Yes, they do. They send the color guard and the police band upon request.

Q. Do you have an opinion as to whether or not that's something that is beneficial to your organization that's marching?

A. It is of great benefit to the organizations that are marching.

Q. Could you explain that benefit?

A. It is a strong presence to have the official color guard of the New York City Police Department, and it is an even greater impression to have the New York City -- the official New York City Police Department band marching and playing music.

Q. Mr. Miranda, since 1996, if you had had the opportunity consistently, absent litigation, to march in public parades in NYPD uniforms, would you have done so?

A. Yes.

Q. Would you consider that an important activity for purposes of LOA as an association?

A. Extremely important activity.

. . . .

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

LATINO OFFICERS ASSOCIATION, INC, and ANTHONY MIRANDA,

Plaintiffs,

-against-

CITY OF NEW YORK, THE POLICE DEPARTMENT OF THE CITY OF NEW YORK; RUDOLPH GIULIANI, Mayor of the City of New York, and HOWARD SAFIR, Police Commissioner of the City of New York,

Defendants.

----------x

September 24, 1999
9:30 a.m.

Before:

HON. LEONARD B. SAND,
District Judge

APPEARANCES

NEW YORK CIVIL LIBERTIES UNION FOUNDATION
Attorneys for Plaintiffs
CHRISTOPHER DUNN
ARTHUR EISENBERG

MICHAEL HESS
Corporation Counsel of the
City of New York
Attorney for Defendants
BRYAN D. GLASS
AMY REGAN

. . . .

Q. Did GOAL have occasion to march on Gay Pride Day?

A. Oh, yes, yes. Actually, we march every year in the Lesbian/Gay Pride Parade, and historically the organization used to march in GOAL T-shirts and a few years ago we began to march in uniform with the NYPD band, and I guess you can -- that's -- I guess that can be -- that's very much a means of communication to the public, I guess. It's a tremendous event.

When we marched in plain clothes, in T-shirts years ago, we always had a tremendous response from the community. I guess it's very symbolic when lesbian/gay people in criminal justice march in such a public forum and was very -- it is a very pride-inducing event.

One of the things I noted, though, when we marched in uniform with the NYPD band, the crowd went from cheering to a tremendous roar. I think there was a tremendous amount of symbolism involved with having our organization and the NYPD marching together in unison. It symbolized a number of things, including I guess –

MS. REGAN: Your Honor, I object as unresponsive to the question.

THE COURT: Overruled.

A. (Continuing) It symbolized a number of things, one of them being in the eyes of I believe most people, the Police Department finally connecting with the community in a way that they felt safe and that members of their community were part of this Police Department out there looking for their interests.

And it also symbolized courage, courage that many of them -- many of them want to have in their lives to come out and walk publicly and proudly as who they are in such a -- and again in uniform in such a public manner with such support from I guess an institution that has been perceived as completely non-supportive throughout its history towards this community.

. . . .

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LATINO OFFICERS ASSOCIATION, INC, and ANTHONY MIRANDA,	:
Plaintiffs,	:
-against-	:
CITY OF NEW YORK, THE POLICE DEPARTMENT OF THE CITY OF NEW YORK; RUDOLPH GIULIANI, Mayor of the City of New York, and HOWARD SAFIR, Police Commissioner of the City of New York,	:
Defendants.	:

STIPULATIONS

1. The NYPD currently recognizes twenty-five religious, fraternal, and ethnic organizations. Those twenty five organizations are the American Legion, Anchor Club (Knights of Columbus), Asian Jade Society, Columbia Association, Emerald Society, Gay Officers' Action League, Guardians Association, Hispanic Society, Holy Name Society (Manhattan-Bronx-Staten Island), Holy Name Society (Brooklyn-Queens), Honor Legion, International Police Association, Police Officers for Christ, Police Self

Support Group, Police Square Club, Policewomen's Endowment Association, Pulaski Association, Regina Coeli Society, Saint George Association, Saint Paul's Society, Shomrim Society, Steuben Association, Traffic Squad Benevolent Association, Viking Association and Committee of Police Societies.

2. The official goals and missions of each of the twenty-five religious, fraternal, and ethnic organizations currently recognized by the NYPD are set out in each organization's Constitution and By-Laws as submitted to the NYPD, the relevant excerpts of which are attached as Exhibit A.

3. On August 26, 1997, the Latino Officers Association, through counsel, wrote to Police Commissioner Howard Safir and requested that the NYPD formally recognize the LOA.

4. On September 15, 1997, Commissioner Howard Safir responded to the LOA's letter of August 26, 1997, with a letter in which he stated, "I have referred your request for the official recognition of the Latino Officers' Association to the First Deputy Commissioner, Patrick E. Kelleher, for review and evaluation. A member of his staff will contact you in the near future to obtain the information necessary to make this determination. Upon receipt of the relevant information, we will give your request appropriate consideration."

5. On October 9, 1997, the Latino Officers Association, through counsel, wrote to First Deputy Commissioner

Patrick Kelleher informing Mr. Kelleher that the LOA had received no communication from the NYPD following Commissioner Safir's September 15, 1997, letter and asking Mr. Kelleher to contact the LOA about its request for NYPD recognition.

6. On May 13, 1998, the NYPD issued NYPD Personnel Bureau Memo 30, which addresses NYPD recognition of religious, fraternal, and ethnic organizations (copy attached as Exhibit B).

7. After the defendants had provided the Latino Officers Association with an advance copy of the NYPD Personnel Bureau Memo 30, the LOA on May 8, 1998, again applied for formal recognition by the NYPD.

8. The NYPD applied the provisions of paragraphs 1, 2, 3(first), and 5 of NYPD Personnel Memo 30 to the pending application of the Latino Officers Association for recognition by the NYPD.

9. The NYPD is not applying the provisions of paragraphs 3(first) and 5 NYPD Personnel Memo 30 to any of the twenty-five religious, fraternal, or ethnic organizations that the NYPD currently recognizes.

10. The twenty-five religious, fraternal, or ethnic organizations currently recognized by the NYPD do not need to satisfy the provisions of paragraphs 3(first) and 5 of NYPD Personnel Memo 30 to continue as NYPD-recognized organizations.

11. The NYPD formally allows only NYPD-recognized religious, fraternal, and ethnic organizations to march in public parades in NYPD uniforms behind a banner identifying the organization. Organizations that the NYPD has not recognized are not granted permission to march in uniform behind their organizational banner.

12. Religious, fraternal, and ethnic organizations recognized by the NYPD routinely march in public parades in uniform behind their organizational banners.

13. The NYPD did not permit the Latino Officers Association to march in uniform behind its organizational banner in the Bronx Puerto Rican Day parade scheduled for Sunday, May 23, 1999, because the LOA was not formally recognized by the NYPD.

14. The NYPD would not permit the Latino Officers Association to march in uniform behind its organizational banner in the Puerto Rican Day parade scheduled for Sunday, June 13, 1999, because the LOA was not formally recognized by the NYPD.

15. The NYPD formally allows only NYPD-recognized religious, fraternal, and ethnic organizations to recruit new members at the Police Academy through participation in Fraternal Day. Organizations that the NYPD has not recognized are not permitted to recruit at the Academy.

16. The NYPD formally allows groups other than

NYPD-recognized religious, fraternal, and ethnic organizations to post organizational materials on bulletin boards on NYPD property (including in precincts and at One Police Plaza). Pursuant to this policy, the NYPD is permitting the Latino Officers Association to post organizational materials on these bulletin boards.

17. NYPD Personnel Bureau Memo 30 (May 13, 1998) contains all the written guidelines that currently exist concerning NYPD recognition of religious, fraternal, or ethnic organizations.

18. The Dominican Officers Association is an organization that includes NYPD members and that is not formally recognized by the NYPD.

19. On May 5, 1999, Police Commissioner Howard Safir denied the May 1998 request from the Latino Officers Association for official NYPD recognition.

20. It is the defendants' position that Commissioner Safir denied the May 1998 request from the Latino Officers Association for NYPD recognition solely and exclusively because Commissioner Safir concluded that the activities of LOA were duplicative of the Hispanic Society's activities.

21. As of the date of these stipulations, the NYPD would consider recognizing more than one organization for each ethnic group if applying organizations could distinguish themselves from already recognized organizations serving the same ethnic group in terms

of goals and objectives.

22. NYPD Personnel Bureau Memo 30 includes certain guidelines pertaining to the decision by the Police Commissioner about whether to confer official NYPD recognition upon a fraternal, ethnic, or religious group, but the Commissioner is not bound by those guidelines, and the decision whether to confer official recognition upon a fraternal, ethnic, or religious organization is committed to his sole discretion.

23. In deciding whether to confer official NYPD recognition upon a fraternal, ethnic, or religious group, the Police Commissioner can consider factors other than those identified in NYPD Personnel Bureau Memo 30.

BRYAN D. GLASS (BG-9823)
Assistant Corporation Counsel
New York City Law Department
100 Church Street
New York, N.Y. 10007

Defendants' Counsel

CHRISTOPHER DUNN (CD-3991)
New York Civil Liberties Union Found.
125 Broad Street, 17th Floor
New York, N.Y. 10004

Plaintiffs' Counsel

Dated: New York, N.Y.
September 2, 1999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LATINO OFFICERS ASSOCIATION, INC, and ANTHONY MIRANDA,	:
Plaintiffs,	:
-against-	:
CITY OF NEW YORK, THE POLICE DEPARTMENT OF THE CITY OF NEW YORK; RUDOLPH GIULIANI, Mayor of the City of New York, and HOWARD SAFIR, Police Commissioner of the City of New York,	:
Defendants.	:

SECOND AMENDED COMPLAINT

PRELIMINARY STATEMENT

1. The plaintiffs bring this civil rights action to vindicate their rights under the First Amendment of the United States Constitution. The plaintiff Latino Officers Association (LOA) is an organization of members of the New York City Police Department (NYPD) that was formed in January 1996 to advance the interests of Latino members of the Department and Latino communities served by the Department. Since its founding, LOA officers have made

numerous public statements criticizing NYPD positions concerning discrimination by the Department and concerning police misconduct.

2. The NYPD confers official Department recognition on certain religious, fraternal, and ethnic organizations of NYPD members like the LOA, and it currently recognizes twenty-five such organizations. With NYPD recognition come important organizational benefits, such as the right to march in public parades in NYPD uniform behind an organizational banner, the right to recruit new members at the Police Academy, the right to participate in certain meetings with NYPD officials, and the right to use certain NYPD meeting rooms.

3. Since 1996 the LOA has been seeking recognition from the NYPD, but the NYPD has refused to grant recognition to the LOA. Most recently, defendant Howard Safir on May 5, 1999, denied the LOA's third request for recognition. Though the only reason given by Commissioner Safir for his decision was his conclusion that LOA was duplicative of an already-recognized organization, the plaintiffs believe that his decision in fact was in retaliation for the critical public statements made by LOA of certain Police Department policies and positions. Moreover, even a concern about duplicativeness cannot justify the burden the defendants' actions have placed on the plaintiffs' First Amendment activities. Finally, the NYPD's recognition policy is unconstitutional on its face because it confers unfettered discretion on the Police Commissioner to prohibit or to permit

associational activity protected by the First Amendment.

4. The defendants' unconstitutional actions have substantially harmed the plaintiffs by prohibiting them from engaging in a range of activities that are necessary and important to their First Amendment associational rights and by causing them substantial monetary injury. The plaintiffs seek a declaration that the defendants have violated their constitutional rights; a permanent injunction prohibiting them from continuing their conduct; nominal, compensatory, and punitive damages; an award of attorneys fees; and any other relief the court deems appropriate.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over the federal claims pursuant to 28 U.S.C. §§ 1331, 1343(3-4).

6. Venue is proper pursuant to 28 U.S.C. § 1391(b) in that plaintiffs' claims arose in the Southern District of New York.

7. Jurisdiction to grant declaratory judgment is conferred by 28 U.S.C. §§ 2201, 2202. Injunctive relief is authorized by Rule 65 of the Federal Rules of Civil Procedure. An award of costs and attorneys fees is authorized pursuant to 42 U.S.C. § 1988.

PARTIES

8. Plaintiff LATINO OFFICERS ASSOCIATION is a not-for-profit corporation, duly organized and existing under the laws of the State of New York, that is comprised largely of members of the NYPD. It brings suit on its own behalf and on behalf of its members.

9. Plaintiff ANTHONY MIRANDA is the President of the Latino Officers Association.

10. Defendant HOWARD SAFIR is the Commissioner of the New York City Police Department and has his office at 1 Police Plaza, New York, N.Y. 10038. Mr. Safir is sued in his official capacity for injunctive relief and in his individual capacity for nominal, compensatory, and punitive damages.

11. Defendant RUDOLPH GIULIANI is the Mayor of the City of New York and has his office at City Hall, New York, N.Y. 10007. He is sued in his official capacity for injunctive relief.

12. The CITY OF NEW YORK is a municipality organized under the laws of the State of New York.

FACTUAL ALLEGATIONS

13. The Latino Officers Association (LOA) was formed in January 1996 by members of the New York City Police Department (NYPD) who were concerned about discrimination by the NYPD against Latino

members of the NYPD and Latino communities served by the NYPD.

14. Since its inception LOA officers repeatedly have spoken critically of NYPD policies and positions that pertain to discrimination and misconduct by the NYPD. For instance, between January 1, 1996, and May 10, 1999, there were seventy-seven stories in major newspapers alone that reported an LOA position or quoted an LOA official bearing on some NYPD practice or policy, virtually all of which involved allegations of discrimination by the Department or related issues.

15. The NYPD has a process by which it confers official recognition on religious, fraternal, and ethnic organizations comprised of NYPD members. With NYPD recognition come important organizational benefits, such as the right to march in public parades in NYPD uniform behind an organizational banner, the right to recruit new members from the Police Academy, the right to participate in certain meetings with NYPD officials, and the right to use meeting rooms at NYPD headquarters. Organizations that are not recognized are not permitted to engage in any of these activities.

16. The NYPD currently recognizes twenty-five religious, fraternal, and ethnic organizations. Those twenty five organizations are the American Legion, Anchor Club (Knights of Columbus), Asian Jade Society, Columbia Association, Emerald Society, Gay Officers' Action League, Guardians Association,

Hispanic Society, Holy Name Society (Manhattan-Bronx-Staten Island), Holy Name Society (Brooklyn-Queens), Honor Legion, International Police Association, Police Officers for Christ, Police Self Support Group, Police Square Club, Policewomen's Endowment Association, Pulaski Association, Regina Coeli Society, Saint George Association, Saint Paul's Society, Shomrim Society, Steuben Association, Traffic Squad Benevolent Association, Viking Association and Committee of Police Societies.

17. Religious, fraternal, and ethnic organizations recognized by the NYPD routinely march in public parades in uniform behind their organizational banners. Such marching is important for promoting these organizations both within the Department and to the public that views these parades.

18. Religious, fraternal, and ethnic organizations recognized by the NYPD routinely participate in recruitment activities at the Police Academy. Such participation is an essential part of recruiting new members for these organizations.

19. Religious, fraternal, and ethnic organizations recognized by the NYPD routinely participate in meetings with NYPD officials. Such participation is an essential part of advancing the interests of these organizations and their members.

20. Religious, fraternal, and ethnic organizations recognized by the NYPD routinely use NYPD facilities for their events. Such use is an essential

part of the activities of these organizations and their members.

21. The very fact of recognition is also critically important to organizations of NYPD members. The culture of the NYPD is such that police officers are very reluctant to join an organization that is not sanctioned by the Department. This situation is exacerbated if there is a perception that the Department affirmatively disapproves of the organization.

22. In December 1996 plaintiff Anthony Miranda wrote to Commissioner Safir and requested a meeting to discuss, among other things, NYPD recognition of the LOA.

23. In January 1997 officers of the LOA met with then First Deputy Commissioner Tasano Simonetti and requested that the NYPD formally recognize the LOA. At that meeting First Deputy Commissioner Simonetti informed the LOA that the Police Department would not recognize it. As a result of this decision, the plaintiffs were denied the benefits of recognition.

24. In February 1997 the plaintiffs filed their original complaint in this matter. In June 1997 the court issued a temporary restraining order directing the defendants to permit the LOA to march in NYPD uniforms behind its organizational banner in the Puerto Rican Day Parade, and in August 1997 the court issued a preliminary injunction ordering the

defendants to permit the LOA to march in additional parades while in uniform.

25. On August 26, 1997, the Latino Officers Association, through counsel, wrote to Police Commissioner Howard Safir and requested that the NYPD formally recognize the LOA.

26. On September 15, 1997, Commissioner Howard Safir responded to the LOA's letter of August 26, 1997, with a letter in which he stated, "I have referred your request for the official recognition of the Latino Officers' Association to the First Deputy Commissioner, Patrick E. Kelleher, for review and evaluation. A member of his staff will contact you in the near future to obtain the information necessary to make this determination. Upon receipt of the relevant information, we will give your request appropriate consideration."

27. On October 9, 1997, the Latino Officers Association, through counsel, wrote to First Deputy Commissioner Patrick Kelleher informing Mr. Kelleher that the LOA had received no communication from the NYPD following Commissioner Safir's September 15, 1997, letter and asking Mr. Kelleher to contact the LOA about its request for NYPD recognition.

28. The LOA received no further communication from the NYPD about its August 1997 request for recognition.

29. In February 1998 the court denied the defendants'

motion to dismiss the complaint. The following month the plaintiffs filed their first amended complaint.

30. On May 13, 1998, the NYPD issued NYPD Personnel Bureau Memo 30, which addresses NYPD recognition of religious, fraternal, and ethnic organizations.

31. Though NYPD Personnel Bureau Memo 30 includes certain guidelines pertaining to the decision by the Police Commissioner about whether to confer official NYPD recognition upon a fraternal, ethnic, or religious group, the Commissioner is not bound by those guidelines, and the decision whether to confer official recognition upon a fraternal, ethnic, or religious organization is committed to his sole and unfettered discretion.

32. After the NYPD had provided the Latino Officers Association with an advance copy of NYPD Personnel Bureau Memo 30, the LOA on May 8, 1998, again applied for formal recognition by the NYPD.

33. The NYPD applied certain provisions of NYPD Personnel Memo 30 to the LOA's May 1998 application for recognition by the NYPD. The NYPD, however, has not applied any of those provisions to any of the twenty-five religious, fraternal, or ethnic organizations that the NYPD currently recognizes, and it is not requiring those organizations to satisfy those provisions to continue

as NYPD-recognized organizations.

34. On May 5, 1999, Police Commissioner Howard Safir denied the May 1998 request from the LOA for official NYPD recognition.

35. Commissioner Safir asserts that he denied the May 1998 request from the LOA for NYPD recognition solely and exclusively because he concluded that the activities of the LOA were duplicative of those of the Hispanic Society, another organization already recognized by the NYPD.

36. Many of the twenty-five organization currently recognized by the NYPD have goals and missions that are substantially similar and duplicative.

37. The goals, missions, and activities of the LOA and the Hispanic Society are neither similar nor duplicative.

38. Since virtually its inception, the LOA has had, and continues to have, more members than the Hispanic Society.

39. Upon information and belief, Commissioner Safir has refused to grant recognition to the LOA in retaliation for the public statements and activities of its officers and members.

40. Because the NYPD has refused to recognize it, the LOA is prohibited from marching in public parades in NYPD uniforms behind its organizational banner.

This has substantially hampered the LOA's ability to promote itself both with members of the NYPD and with the general public and to convey its concerns about discrimination and misconduct.

41. Because the NYPD has refused to recognize it, the LOA is prohibited from participating in recruitment activities at the Police Academy. This has substantially hampered the LOA's ability to recruit new members.

42. Because the NYPD has refused to recognize it, the LOA is prohibited from participating in meetings with NYPD officials that are restricted to recognized organizations. This has substantially hampered the LOA's ability to promote its interests and those of its members with the NYPD.

43. Because the NYPD has refused to recognize it, the LOA is prohibited from using certain NYPD facilities for its organizational activities. This has substantially hampered the LOA's ability to engage in important organizational activities.

44. Recognizing the LOA and permitting it to march in public parades in NYPD uniforms behind its organizational banner, to recruit at the Police Academy, to participate in meetings with NYPD officials, and to use NYPD facilities would place no significant burden on the Police Department.

45. On June 8, 1999, the court issue a preliminary injunction ordering the defendants to allow the LOA

to march in five parades while in NYPD uniforms and behind its organizational banner.

46. The defendants' actions have been taken under color of law.

FIRST CAUSE OF ACTION

47. The defendants have violated and continue to violate the plaintiffs' right of free speech and assembly under the First Amendment of the United States Constitution and 42 U.S.C. § 1983.

WHEREFORE, the plaintiff requests that this Court:

(1) Assume jurisdiction over this matter;

(2) Issue a declaration that the defendants are violating the plaintiff's rights under the First Amendment of the United States Constitution and 42 U.S.C. § 1983;

(3) Issue a permanent injunction enjoining the defendants from interfering with the plaintiffs' First Amendment rights;

(4) Award compensatory and punitive damages;

(5) Order the defendants to pay attorneys' fees pursuant to 42 U.S.C. § 1988; and

(6) Grant any other relief the court deems appropriate.

Respectfully submitted,

NEW YORK CIVIL LIBERTIES
UNION FOUNDATION

CHRISTOPHER DUNN (CD-3991)
ARTHUR EISENBERG (AE-2012)
NORMAN SIEGEL (NS-6850)
125 Broad Street, 17th Floor
New York, N.Y. 10004
(212) 344-3005

Attorneys for the Plaintiffs

Dated: August 3, 1999
New York, N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LATINO OFFICERS ASSOCIATION, INC, and ANTHONY MIRANDA,	:
Plaintiffs,	:
-against-	:
CITY OF NEW YORK, THE POLICE DEPARTMENT OF THE CITY OF NEW YORK; RUDOLPH GIULIANI, Mayor of the City of New York, and HOWARD SAFIR, Police Commissioner of the City of New York,	:
Defendants.	:

PLAINTIFFS' AMENDED MOTION FOR A PRELIMINARY INJUNCTION

PLEASE TAKE NOTICE that the plaintiffs shall move, as soon as counsel may be heard, for a preliminary injunction enjoining the defendants from prohibiting the plaintiffs from participating, in their NYPD uniforms and behind their organizational banner, in (1) the Manhattan Puerto Rican Day Parade, scheduled for Sunday, June 13, 1999; (2) the Dominican Day Parade, tentatively scheduled for August 8, 1999; (3) the Brooklyn Puerto Rican Day Parade, tentatively scheduled for August 15, 1999; (4) the Desfile de Hispanidad de Queens, tentatively scheduled for September 12, 1999; and (5) Desfile de Hispanidad, Fifth

Avenue, tentatively scheduled for October 10, 1999. The reasons in support of this motion are set out in the accompanying affidavit and the memoranda of law and affidavits the plaintiffs previously filed.

Respectfully submitted,

NEW YORK CIVIL LIBERTIES
UNION FOUNDATION

CHRISTOPHER DUNN (CD-3991)
ARTHUR EISENBERG (AE-2012)
NORMAN SIEGEL (NS-6850)
125 Broad Street, 17th Floor
New York, N.Y. 10004
(212) 344-3005

Attorneys for the Plaintiffs

Dated: June 2, 1999
New York, N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

LATINO OFFICERS ASSOCIATION, INC, and ANTHONY MIRANDA,

Plaintiffs,

-against-

CITY OF NEW YORK, THE POLICE DEPARTMENT OF THE CITY OF NEW YORK; RUDOLPH GIULIANI, Mayor of the City of New York, and HOWARD SAFIR, Police Commissioner of the City of New York,

Defendants.

----------x

PLAINTIFFS' PROPOSED FINDINGS OF FACT

NEW YORK CIVIL LIBERTIES UNION FOUNDATION

CHRISTOPHER DUNN
ARTHUR EISENBERG
NORMAN SIEGEL
125 Broad Street, 17th Floor
New York, N.Y. 10004
(212) 344-3005

Attorneys for the Plaintiffs

Dated: December 24, 1999
New York, N.Y.

PLAINTIFFS' PROPOSED FINDINGS OF FACT

. . . .

The Benefits of Recognition and the Harm to the LOA Caused by the Denial of Recognition

. . . .

Marching in NYPD Uniforms in Public Parades

52. The NYPD formally allows only NYPD-recognized religious, fraternal, and ethnic organizations to march in public parades in NYPD uniforms behind a banner identifying the organization. Organizations that the NYPD has not recognized are not granted permission to march in uniform behind their organizational banner. [Pretrial Stipulation 11]

53. Religious, fraternal, and ethnic organizations recognized by the NYPD routinely march in public parades in uniform behind their organizational banners. [Pretrial Stipulation 12]

54. When a recognized group marches in a public parade, the NYPD sends the Department color guard and

band upon request. [Testimony of Anthony Miranda, Trial Transcript at 83]

55. Marching in public parades in NYPD uniforms behind an organizational banner is important because it communicates to those viewing the parade that the Police Department includes individuals who share the concerns or views of the marching organization. [Testimony of Edgar Rodriguez, Trial Transcript at 183]

56. The NYPD has prohibited the LOA from marching in various public parades in NYPD uniforms and behind an organizational banner because the LOA is not a recognized organization. [*See* Pretrial Stipulations 13-14]

57. The LOA wishes to march in NYPD uniforms and behind its organizational banner in various cultural Hispanic parades, including the National Puerto Rican Day Parade, which is the largest event in the Hispanic community. [Testimony of Anthony Miranda, Trial Transcript at 76, 80]

58. The LOA wishes to march in NYPD uniforms and behind its organizational banner in various cultural Hispanic parades because it provides the LOA with an important form of communication with the Hispanic community. Specifically, it communicates to that community that there are Hispanic officers in the New York City Police Department and that there are members of the Department who are concerned about police brutality and discrimination.

[Testimony of Anthony Miranda, Trial Transcript at 75-76, 78]

59. Marching in NYPD uniforms in public parades also provides the LOA with an important opportunity to communicate to police officers on duty at those parades that the LOA is a strong organization. [Testimony of Anthony Miranda, Trial Transcript at 79]

60. NYPD Personnel Bureau memo 30 specifically prohibits groups not recognized by the Police Department from using the name "New York City Police Department," and the LOA banner identifies the organization only as "Latino Officers Association - City of New York." [Plaintiffs' Exhibit 15 (paragraph 3 on page 2); Testimony of Anthony Miranda, Trial Transcript at 78-79]

61. If the LOA were not permitted to march in NYPD uniforms in public parades, those watching the parades would not know that the organization was connected to the NYPD. [Testimony of Anthony Miranda, Trial Transcript at 79]

62. It is important for the LOA to march in parades in communities outside of Manhattan because it affords the organization the opportunity to convey its message to those specific communities and it affords the LOA members from those communities the opportunity to participate in parades in their own communities. [Testimony of Anthony Miranda, Trial Transcript at 80-81]

63. The defendants adduced no evidence that allowing the LOA to march in public parades in NYPD uniforms behind their organizational banner would have any adverse impact on the operations of the NYPD or would overburden the resources the Department devotes to groups marching in public parades. [*See* Testimony of Howard Safir, Trial Transcript at 221-71]

. . . .

The NYPD's Purported Justifications for Denying Recognition to the LOA

. . . .

91. The defendants adduced no evidence that allowing the LOA to march in public parades in NYPD uniforms behind their organizational banner would have any adverse impact on the operations of the NYPD or would overburden the resources the Department devotes to groups marching in public parades. [*See* Testimony of Howard Safir, Trial Transcript at 221-71]

. . . .

Respectfully submitted,

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CHRISTOPHER DUNN (CD-3991)
ARTHUR EISENBERG (AE-2012)
NORMAN SIEGEL (NS-6850)
125 Broad Street, 17th Floor
New York, N.Y. 10004
(212) 344-3005

Attorneys for the Plaintiffs

Dated: December 24, 1999
New York, N.Y.